

July 23 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0501

THE STATE OF MONTANA,
Plaintiff/Appellee,
and
KEVIN LEE CHRISTIANSEN,
Respondent/Appellant.

**APPELLANT'S REPLY
BRIEF**

ON APPEAL FROM THE MONTANA TWELFTH JUDICIAL
DISTRICT COURT, HILL COUNTY,
BEFORE THE HONORABLE JOHN C. MCKEON

APPEARANCES:

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2 Fourth, the jury asked:

3 May we please have the legal definition
4 of domination and regulation?

5 Does 'present' & 'existing' mean at the
6 time of the officer's arrival?

7 Fifth, the jury stated:

8 We were unable to come to a unanimous
9 decision.

10 (DC Docket no. 116, Appendix **E**).

11
12 If substantial injustice does not result when
13 jurors don't know the law they are asked to apply
14 because it is horribly confusing, when does substantial
15 injustice result?

16 Is it when a District Judge states during the first
17 trial that the proper instruction on the law is the
18 pattern jury instruction, and in the second trial,
19 makes a complete reversal and states that the pattern
20 jury instruction is confusing - even when the evidence
21 presented in both trials was virtually the same?

22 Again, the State ignores this fact.

23 A close analysis of the testimony demonstrates that
24 the facts presented in both trials were virtually the
25 same. This was due to the fact that they were not
26 contested.

27 What was hotly contested was how those facts fit
28 with the law as drafted in the pattern jury

1 instructions, after this Court indicated that an
2 instruction similar to the District Court's instant
3 instruction was not "the most" clear or understandable.
4 *State v. Robison* (Mont., 1997), 931 P.2d 706, 708.

5 Consequently, there was absolutely no legal or
6 factual justification to provide an instruction which
7 was the law of the case, which the District Court
8 stated was "the correct statement of the law ..."
9 (12/18/08 Tr. pg. 238, lns. 12-23).

10 And it must be pointed out, contrary to the State's
11 assertion, it did not properly object to the pattern
12 jury instruction it offered. The record is clear on
13 this point.

14 Shortly before settling of instructions, the State
15 indicated it wished the Court to provide the *Ruona*
16 instruction. However, it never objected to the
17 provision of the pattern jury instruction and never
18 withdrew this instruction.

19 The State fails to provide any precedent, finding
20 that a request to replace or supplement an instruction
21 constitutes an objection to an instruction.

22 While the State claims Mr. Christiansen was not
23 prejudiced because he was able to argue his theory, as
24 it applied to the erroneous instruction, the State
25 misses the obvious.

26 Presenting a defense theory to a law which is not
27 understandable is like fitting a square peg in a round
28 hole.

1 Mr. Christiansen is not asking anything more than a
2 fair trial, where the jury understands the law, which
3 has been approved of by this Court, and by the District
4 Court in the first trial.

5 Finally, the State's closing comment in its brief
6 is untrue and uncalled for. Mr. Christiansen did not
7 concede every element required for conviction.

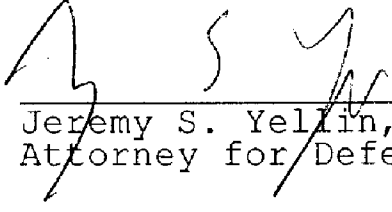
8 He vigorously contested the element of "actual
9 physical control," and was, in fact, severely
10 prejudiced by the District Court's erroneous
11 instruction.

12 To say Mr. Christiansen was not prejudiced is
13 disingenuous.

14 **CONCLUSION**

15 As a result of the erroneous instruction on "actual
16 physical control," Mr. Christiansen was wrongfully
17 convicted of DUI.

18 DATED this 22nd day of July, 2010.

19
20 
21 _____
22 Jeremy S. Yellin, Esq.
23 Attorney for Defendant
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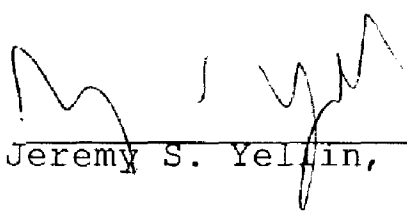
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 22nd day of July, 2010,
3 I served a copy of the foregoing APPELLANT'S REPLY BRIEF
4 upon the following:

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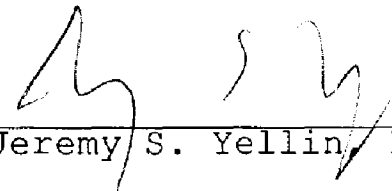
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24 **CERTIFICATE OF COMPLIANCE**

25 Pursuant to Rule 27 of the Montana Rules of
26 Appellate Procedure, I certify that this principal brief
27 is printed with Courier monospaced typeface having 12
28 characters per inch; is double spaced except for
footnotes and for quoted indented material, does not
exceed 30 pages, excluding table of contents, table of
citations, certificate of service and appendix.

29 
30 _____
31 Jeremy S. Yellin, Esq.